

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>DELORES JOHNSON</b>	)	
Claimant	)	
VS.	)	
	)	Docket No. 203,646
<b>SALEM HOSPITAL, INC.</b>	)	
Respondent	)	
AND	)	
	)	
<b>LIBERTY MUTUAL INSURANCE COMPANY</b>	)	
Insurance Carrier	)	
AND	)	
	)	
<b>KANSAS WORKERS COMPENSATION FUND</b>	)	

**ORDER**

The Kansas Workers Compensation Fund (Fund) appeals the Award of Administrative Law Judge John D. Clark dated December 12, 1997, which assesses 100 percent of the liability in this matter against the Fund. Oral Argument was held on June 12, 1998, in Wichita, Kansas.

**APPEARANCES**

Claimant appeared not, having resolved her disputes with respondent in this matter by settlement hearing on August 18, 1995. Respondent and its insurance carrier appeared by their attorney, Douglas D. Johnson of Wichita, Kansas. The Fund appeared by its attorney, Vincent L. Bogart of Wichita, Kansas. There were no other appearances.

**RECORD AND STIPULATIONS**

The record and stipulations as specifically set forth in the Award of the Administrative Law Judge are herein adopted by the Appeals Board.

**ISSUES**

- (1) What is the date of accident in this matter?
- (2) What, if any, is the nature and extent of claimant's injury and disability?
- (3) What, if any, is the liability of the Kansas Workers Compensation Fund in this matter?

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the whole evidentiary record filed herein, the Appeals Board makes the following findings of fact and conclusions of Law:

Claimant first began having problems with her right hand in October 1991 while working for respondent. Claimant attributes the start of her problems to using a labeling gun, which injured the muscles and tissues in her right wrist. Claimant underwent surgery with Dr. Charles Craig in December 1991. She returned to work for respondent who, in keeping with the restrictions, eliminated the use of the labeling gun, using a computer and a printout sheet instead. Claimant progressed well for approximately a year and half. However, in July and August of 1993, she began having problems with her right hand and wrist. Claimant could not think of a specific incident which brought on the symptoms but speculated she may have felt something while lifting boxes of IV solutions in July or August 1993. An incident report was created and claimant was referred to Dr. Craig in late 1993. He diagnosed reoccurring carpal tunnel syndrome, but was reluctant to do a second surgery. Claimant was referred to Dr. J. Mark Melhorn who first saw her on April 29, 1994. Dr. Melhorn also diagnosed carpal tunnel syndrome, and performed surgery on September 19, 1994.

Claimant was placed under no restrictions while being treated by Dr. Melhorn although there is indication in the record that she may have been provided a splint to wear while performing her job duties. It is unclear from the record, however, exactly when this splint was provided or by whom. There is also indication in the record that the splint was provided in 1991 or sometime after the first onset of pain.

Claimant settled her dispute with respondent from the 1993 injury by way of settlement hearing on August 18, 1995. There was no litigation and claimant received no compensation other than temporary benefits from the 1991 injury.

While it is obvious respondent was aware of claimant's ongoing symptomatology, to assess financial liability in this matter to the Fund, the Appeals Board must first decide the appropriate date of accident.

The Kansas Legislature amended K.S.A. 44-567 in 1993 to eliminate all workers compensation liability against the Fund for any injury which occurs on or after July 1, 1994. In this instance, respondent alleges claimant suffered accidental injury in July or August 1993 when she began experiencing symptoms. The Fund, on the other hand, argued that claimant's date of accident should be September 1994, when claimant underwent surgery.

In workers compensation cases, the law in effect at the time of the injury governs the rights and obligations of the parties. Osborn v. Electric Corp. of Kansas City, 23 Kan. App. 2d 868, Syl. ¶ 8, 936 P.2d 297, *rev. denied* 262 Kan. \_\_\_\_ (1997).

The date of accident is significant in this matter because, if the claimant's date of accident is prior to July 1, 1994, a portion of the liability may be assessed to the Fund. However, if claimant's date of accident is found to be July 1, 1994, or after, no liability can be assessed to the Fund.

K.S.A. 44-508(e) defines personal injury and injury as "any lesion or change in the physical structure of the body, causing damage or harm thereto, so that it gives way under the stress of the worker's usual labor."

The problem in carpal tunnel and other microtrauma injuries is that the lesion or change in the physical structure of the body, causing damage or harm, occurs over a significant period of time in minute insult. It is not a specific trauma which can be identified on a particular date or dates, but is a long-term breakdown of the body's physical structure.

In considering dates of accident, in microtrauma injury situations the Kansas Court of Appeals has provided some direction. In Berry v. Boeing Military Airplanes, 20 Kan. App. 2d 220, 885 P.2d 1261 (1994), the Court of Appeals found that, because of the complexities of deciding dates of accident in carpal tunnel situations, the process would be simplified and made more certain by adopting a rule that the date of accident is the last date worked by the claimant. This "bright line rule" was specifically applied to carpal tunnel cases after Berry.

The Court of Appeals then included microtrauma injuries beyond carpal tunnel syndrome in Condon v. Boeing Co., 21 Kan. App. 2d 580, 903 P.2d 775 (1995). A distinction between Condon and Berry is that, in Berry, claimant was forced to quit his job because of his injury. Condon, citing Berry, held significant "[t]he date of accident or date of occurrence in a workers compensation action involving carpal tunnel syndrome is the last date on which claimant performs services for his or her employer and is required to stop working as a direct result of claimant's pain and disability resulting from carpal tunnel syndrome." Id. at 587.

However, in Condon, the worker suffered microtrauma injuries and was then laid off in a general lay off and not because of a medical condition. The Court of Appeals in Condon did not use the last day worked, finding that any work subsequent to July 1, 1993, after which claimant did return work, would not have significantly contributed to the claimant's condition. The Condon date of accident was found to be June 15, 1993, the date that claimant informed her treating physician of additional pain. The claimant in Condon suffered a multitude of medical conditions beyond carpal tunnel syndrome including cervical spondylopathy, double crush syndrome, flexor tenosynovitis, overuse syndrome, lateral epicondylitis, a mild bulging at C6-7, overuse syndrome of the cervical spine, left shoulder girdle, and left upper extremity with aggravation of degenerative changes in the cervical spine, tendinitis in the left shoulder, epicondylitis of the elbow, and entrapment neuropathy of the ulnar nerve at the left elbow and wrist. The Court of Appeals clearly expanded Berry beyond simple carpal tunnel syndrome.

The Kansas Court of Appeals in Alberty v. Excel Corp., 24 Kan. App. 2d 678, 951 P.2d 967, *rev. denied* 264 Kan. \_\_\_\_ (1998), again addressed the issue of dates of accident in microtrauma workers compensation litigation. The Court in Alberty found the Alberty situation to be more similar to Condon than Berry as, in Alberty, the claimant's carpal tunnel syndrome did not necessitate that she leave her employment with respondent. The Alberty Court found the date of accident in a repetitive trauma case to be the last date of work before work restrictions were implemented, citing Condon. The fact that the claimant in Alberty was able to return to work was considered significant in establishing the date of accident.

In this instance, claimant was provided no restrictions, with the exception of a splint, the date of which is unspecified. She continued performing her regular job up until the September 1994 surgery performed by Dr. Melhorn. There is no indication that respondent provided her with any type of accommodation during this period of time and she was provided no specific medical restrictions prior to surgery. The Appeals Board, therefore, finds that the date of accident, in this instance, is the date on which claimant last performed services for her employer and was required to stop as a direct result of claimant's pain and disability from the carpal tunnel syndrome. The Appeals Board acknowledges this is not exactly Berry as claimant did return to work for respondent after the surgery. It further acknowledges this is not exactly Condon or Alberty as claimant was not provided restrictions by a treating physician which precluded her from doing her regular job. This date is, however, the last date claimant worked for respondent and suffered aggravation of her carpal tunnel syndrome as a result of her work duties before she underwent surgery at the hands of Dr. Melhorn. Logically, this becomes the last date on which claimant suffered microtrauma and is the appropriate date of accident in these circumstances. As K.S.A. 44-567(a) eliminates all fund liability for injuries occurring on or after July 1, 1994, there can be no liability assessed to the Fund in this instance.

#### **AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge John D. Clark dated December 12, 1997, should be, and is hereby, reversed and the liability in this matter is assessed fully against the respondent with none against the Kansas Workers Compensation Fund. The Workers Compensation Fund will be liable for its own attorney fees.

This finding renders the issues regarding the nature and extent of claimant's injury and disability moot.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of August 1998.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Douglas D. Johnson, Wichita, KS  
Vincent L. Bogart, Wichita, KS  
John D. Clark, Administrative Law Judge  
Philip S. Harness, Director